STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2001 OAL Determination No. 9

November 20, 2001

Requested by: **California State Employees Association**

Concerning: **Department of Corrections – 60-Day and 120-Day Limitations upon Temporary Duty (Light Duty) Assignments for Medically Restricted Employees of the Department of Corrections**

Determination issued pursuant to Government Code Section 11340.5; California Code of Regulations, Title 1, Section 121 et seq.

ISSUE

Do the 60-day and 120-day limitations upon temporary duty (light duty) assignments for medically restricted employees of the Department of Corrections, as contained in the Department of Corrections' Operations Manual sections 31020.7.6.5.1 and 31020.7.6.5.7, constitute "regulations" as defined in Government Code section 11342.600 which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act?[1]

1. The request for determination was filed by the California State Employees Association (Claire Iandoli, Staff Attorney), 2020 Challenger Drive, Suite 102, Alameda, CA 94501, (510) 522-4357. The Department of Corrections' response was filed by E. A. Mitchell, Interim Assistant Director, Office of Correctional Planning, Department of Corrections, P.O. Box 942883, Sacramento, CA 94283-0001. The request was given a file number of 00-002. This determination may be cited as **"2001 OAL Determination No. 9."**

CONCLUSION

The 60-day and 120-day limitations upon temporary duty (light duty) assignments for medically restricted employees of the Department of Corrections, as contained in the Department of Corrections' Operations Manual sections 31020.7.6.5.1 and 31020.7.6.5.7, constitute "regulations" which are required to be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act.

BACKGROUND

The California State Employees Association ("CSEA") filed this request for determination with the Office of Administrative Law ("OAL") on behalf of its represented employees who work for the Department of Corrections ("Department"). CSEA has raised concerns regarding rules of the Department contained in the Department Operations Manual ("DOM"), pertaining to "Temporary Duty Assignments for Medically Restricted Staff." In general, provisions in the DOM set forth rules relating to temporary duty assignments (sometimes referred to as "light duty" assignments) for medically restricted employees of the Department who cannot perform their regular duties of employment due to temporary disabilities.[2] Within these provisions, the two rules specifically at issue in CSEA's request for determination can be referred to as the "60-day limitation" and the "120-day limitation," and are summarized below.

The 60-Day Limitation: DOM section 31020.7.6.5.1, "Eligibility Criteria," provides, in part, the following:

> "Staff with all types of temporary disabilities including, but not limited to, sprains, fractures, pregnancies, back injuries, and stress-related disabilities shall be eligible for such temporary duty assignments as are available in keeping with their medical restrictions.
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> "Eligible staff are those who have received medical clearance for a modified assignment from both their treating physician and the [chief medical officer] of the institution in which they work or which is nearest their work location if they are [Parole and Community Services Division] staff or Central Office staff. *Their medical prognosis shall also indicate a reasonable expectation of returning to their regular assignment within 60 days.* [Emphasis added.]"

2. See DOM sections 31020.7.6.5 through 31020.7.6.6.

Based upon the supporting information submitted by CSEA, the effect of this 60-day limitation is essentially to restrict the initial term of a temporary duty assignment to a maximum of 60 days.

The 120-Day Limitation: DOM section 31020.7.6.5.7, entitled "Extension of Temporary Duty Assignments," provides as follows:

> "If, after the initial temporary duty period, the employee is still not able to return to full duty, the [return-to-work-coordinator] may extend the temporary duty assignment as needed, *not to exceed a total of 120 calendar days*. Extensions shall be granted only when there is medical justification indicating that the employee shall be able to return to full duty by the end of the extension period.
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> "Only one such temporary duty assignment, not to exceed the maximum allowable time limits, shall be permitted the employee within a 12-month period for each specific disability. [Emphasis added.]"

Consequently, the maximum duration of any single temporary duty assignment (after extension) is limited to 120 days.

Applications of the Limitations: As part of its request, CSEA submitted supporting memoranda and other documents from the Department applying the 60-day and 120-day limitations upon temporary duty (light duty) assignments. For example, a memorandum, entitled "Temporary Duty Request (Approved)," addressed to two different Department employees, specifically states: "Please be advised that under NO circumstances will a temporary duty assignment exceed 120 calendar days." (Emphasis in original.) Another memorandum addressed to a Department employee, entitled "Notice of Light Duty Status," states in part:

> "As of January 1, 1999, an employee who has the restriction of 'no mandatory overtime' will fall within the guidelines of the light duty policy as outlined in the Department of Corrections' DOM Section 31020. Under this policy, an employee can be offered up to sixty (60) calendar days of light duty with a physician's note such as you have supplied to me in the past. An additional sixty calendar days can be offered (totaling 120 calendar days of light duty) if the physician can certify that in offering the additional time, the employee will likely return to full duty status.

> "The most recent note in my possession was written last September and was to cover you for six (6) months. That medical verification exceeds the [Department] policy, as it exceeds the 120 calendar days limit.
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> "At this time, you will need to produce a medical note that releases you from your exemption, or you will need to go under your physician's care, to return to work when you are no longer restricted."

Another document, entitled "Employee Expectations – Temporary Duty," requires employees seeking temporary duty assignments at California State Prison-Solano to agree to a number of conditions, including the following:

> "I am aware that this assignment is limited to a maximum of 60 calendar days. If, after the initial temporary duty period, I am still not able to return to full duty, the [return-to-work-coordinator] may extend the temporary duty assignment as needed, but will not exceed a total of 120 calendar days. Extensions may be granted when there is medical information indicating that I will be able to return to full duty in my usual and customary occupation by the end of this period. If I am unable to return to full duty at the end of 120 calendar days of temporary duty, appropriate medical action may be taken. [Emphasis in original.]"

In its request for determination, CSEA summarized its legal concerns regarding DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 in the following statement: "Specifically, CSEA is challenging Sections 31020.7.6.5.1 and 31020.7.6.5.7 as invalid regulations that do not comply with the Administrative Procedures [sic] Act and further violate the Americans with Disabilities Act by limiting the time by which an employee can remain on light duty. Under the DOM, the initial period of disability is limited to sixty (60) days, with a maximum allowable time limit of 120 days."[3]

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3. In the context of a request for determination under Government Code section 11340.5 and California Code of Regulations, title 1, sections 121 through 128, OAL's authority is limited to determining whether the state agency rules at issue are "regulations" as defined in Government Code section 11342.600 which are required to be adopted pursuant to the APA. Consequently, this determination does not address whether DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 violate the Americans with Disabilities Act, 42 U.S.C. section 12101 et seq., or the related California law, the California Fair Employment and Housing Act, Government Code section 12900 et seq. However, the Americans with Disabilities Act and the California Fair Employment and Housing Act are relevant in

ANALYSIS

A determination of whether the 60-day and 120-day limitations contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 are "regulations" subject to the Administrative Procedure Act ("APA") (ch. 3.5, commencing with sec. 11340, pt. 1, div. 3, tit. 2, Gov. Code) depends on (1) whether the APA is generally applicable to the quasi-legislative enactments of the Department, (2) whether the challenged rules are "regulations" within the meaning of Government Code section 11342.600, and (3) whether the challenged rules fall within any recognized exemption from APA requirements.

(1) As a general matter, all state agencies in the executive branch of government and not expressly exempted are required to comply with the rulemaking provisions of the APA when engaged in quasi-legislative activities. *(Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747; Gov. Code, secs. 11342.520 and 11346.) Moreover, the term "state agency" includes, for purposes applicable to the APA, "every state office, officer, department, division, bureau, board, and commission." (Gov. Code, sec. 11000.)

Penal Code section 5054 provides that:

> "The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]."

The Department is in neither the judicial nor legislative branch of state government, and therefore, unless expressly exempted therefrom, the APA rulemaking requirements generally apply to the Department.

In this connection, Penal Code section 5058, subdivision (a), states in part as follows:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons . . . . The rules

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connection with the analysis of whether the "internal management" exemption from the APA applies, as discussed later in this determination.

and regulations shall be promulgated and filed *pursuant to [the APA]* . . . . [Emphasis added.]"

Thus, the APA rulemaking requirements generally apply to the Department. (See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942, 107 Cal.Rptr. 596, 603 (agency created by Legislature is subject to and must comply with APA.))

(2) Government Code section 11340.5, subdivision (a), prohibits state agencies from issuing rules without complying with the APA. It states as follows:

> "(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['] regulation['] as defined in Section 11342.600, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

Government Code section 11342.600, defines "regulation" as follows:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. [Emphasis added.]"

According to *Engelmann v. State Board of Education* (1991) 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274-275, agencies need not adopt as regulations those rules contained in a "'statutory scheme which the Legislature has [already] established . . . .'" But "to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations . . . ."

Similarly, agency rules properly adopted as *regulations* (i.e., California Code of Regulations ("CCR") provisions) cannot legally be "embellished upon." For example, *Union of American Physicians and Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 500, 272 Cal.Rptr. 886, 891 held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation. Thus, statutes may

legally be amended only through the legislative process; duly adopted regulations – generally speaking – may legally be amended only through the APA rulemaking process.

Under Government Code section 11342.600, a rule is a "regulation" for these purposes if (1) the challenged rule is *either* a rule or standard of general application *or* a modification or supplement to such a rule and (2) the challenged rule has been adopted by the agency to *either* implement, interpret, or make specific the law enforced or administered by the agency, *or* govern the agency's procedure. (See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251;[4] *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, 890.)

For an agency rule to be a "standard of general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order. (*Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class).) The challenged rules contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 apply to all members of the open class of employees of the Department. An "open class" is one whose membership could change, and the membership of the class of Department employees could certainly change over time. Consequently, these DOM sections are standards of general application.

Furthermore, the 60-day and 120-day limitations contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 both implement, interpret, or make specific the law enforced or administered by the Department and govern the Department's procedure. These provisions implement, interpret, or make specific Penal Code sections 5054 and 5058 and Government Code section 11152.[5] The 60-day and

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4. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr.2d 186, 198. *Grier*, however, is still good law for these purposes and the other purposes discussed in this determination.

5. Government Code section 11152 states as follows: "Subject to the approval of the Governor, the head of each [state government] department may arrange and classify the work of the department and consolidate, abolish, or create divisions thereof. So far as consistent with law the head of each department may adopt such rules and regulations as are necessary to govern the activities of the department and may assign to its officers and

120-day limitations are not contained either in existing statutes applicable to the Department or in existing regulations duly adopted under the APA.[6] In other words, these rules "embellish upon" existing law.[7] These provisions also govern the Department's procedure relating to employees with temporary disabilities.

Thus, DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 are "regulations" as defined in Government Code section 11342.600.

(3) With respect to whether the 60-day and 120-day limitation rules contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 fall within any recognized exemption from APA requirements, generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute. (Gov. Code, sec. 11346; *United Systems of Arkansas, Inc. v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411 ("*When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language.*") (Emphasis added.) The Department has asserted that three different APA exemptions are applicable to this request for determination. Each of these APA exemptions is discussed below.

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employees such duties as he sees fit. For the betterment of the public service, he may reassign to any employees under the chief of any division, such duties as he sees fit."

6. We note that California's State Personnel Board has adopted a regulation in accordance with the APA relating to "Temporary Assignments for Injured Employees" which is set forth in CCR, title 2, section 443. This regulation generally provides that under specified conditions injured employees of the State of California may receive temporary assignments involving duties of a class other than the one to which they are appointed for a period of up to two years. The 60-day and 120-day limitations on temporary duty assignments are not contained in this regulation.

7. OAL considered the issue of whether the specific provisions of DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 might be contained in memoranda of understanding ("MOUs") entered into between state employee organizations and the Governor, and approved by the Legislature (see ch. 10.3 (commencing with sec. 3512), div. 4, tit. 1, Gov. Code). We reviewed a number of the MOUs for different state employee bargaining units, focusing primarily on those bargaining units represented by CSEA and on the MOUs covering the period of July 1, 1999 through June 30, 2001 (or through July 2, 2001). A number of the MOUs we reviewed did have various provisions pertaining to "temporary disabled employees" and "light/limited duty assignments." However, the specific provisions of DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 are not contained in MOUs governing all state employees potentially affected by these DOM sections.

The "Internal Management" Exemption: In its response to the request for determination, the Department has expressed the position that DOM sections 31020.7.6.5.1 and 31020.7.6.5.7, which contain the 60-day and 120-day limitations upon temporary duty assignments, fall within the "internal management" exemption from the APA.[8]

Government Code section 11340.9 sets forth a number of types of regulations and other circumstances where the APA does not apply (i.e., APA exemptions, sometimes referred to as APA "exceptions"), including an exemption for "A regulation that relates only to the *internal management* of the state agency." (Gov. Code sec. 11340.9, subd. (d); emphasis added.) Thus, the APA sets forth an express exemption for rules concerning the "internal management" of individual state agencies.

The California Court of Appeal in *Grier v. Kizer* summarizes case law on internal management, stating:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] "Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the . . . statutes . . . .*" [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]
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> "*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: '"Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community."' . . . [Citation.]

8. Department's "Response to Request for Determination," September 17, 2001, pages 2 and 6.

> "Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody.
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> "By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception . . . ."[9]

The internal management exemption has been judicially determined to be narrow in scope.[10] The courts apply the "internal management" exemption if the "regulation" at issue (1) affects only the employees of the issuing agency,[11] and (2) does not address a matter of serious consequence involving an important public interest.[12]

The 60-day and 120-day limitations contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 directly affect only employees of the issuing agency (the Department). However, we find that these rules do address a matter of serious consequence involving an important public interest – the protection of employees with disabilities from employment discrimination and the "reasonable accommodation" of employees with disabilities in the workplace (as discussed in some detail below).

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9 . *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436, 268 Cal.Rptr. 244, 252-253.

10. *Id.*

11. See *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; *Stoneham v. Rushen (Stoneham I)* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596.

12. See *Poschman, supra,* 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and *Armistead, supra,* 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.

The Americans with Disabilities Act (the "ADA"; 42 U.S.C. sec. 12101 et seq.) and the California Fair Employment and Housing Act (the "FEHA"; Gov. Code sec. 12900 et seq.) contain provisions protecting employees with "disabilities" from employment discrimination and providing for employment-related "reasonable accommodation" of employees with disabilities. The stated "purposes" of the ADA as set forth in 42 U.S.C. section 12101, subdivision (b), include, in part, the following: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." The California FEHA sets forth in Government Code section 12920 the following statement of public policy: "It is hereby declared as *the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . physical disability, mental disability, [or] medical condition . . . .*" (Emphasis added.) Furthermore, the FEHA also makes the following declaration in Government Code section 12921, subdivision (a): "The opportunity to seek, obtain and hold employment without discrimination because of . . . physical disability, mental disability, [or] medical condition . . . is hereby recognized as and *declared to be a civil right.*" (Emphasis added.) Thus, protecting employees with disabilities from discrimination in the workplace under the ADA and FEHA is a matter of serious consequence involving an important public interest.

"Reassignment to a vacant position" is one recognized form of "reasonable accommodation" for employees with disabilities under both the ADA and the FEHA. (See 42 U.S.C. sec. 12111(9), and Gov. Code sec. 12926, subd. (n).) "Reassignment to a vacant position" could potentially include the transfer of employees with disabilities to vacant light duty positions.[13]

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13. The subject of "reasonable accommodation" of employees with disabilities by "reassignment to a vacant position" has been the topic of much discussion and litigation under the ADA and the FEHA. See the federal Equal Employment Opportunity Commission's interpretative guidance regarding "Reasonable Accommodation" at 29 C.F.R. Part 1630, Appendix to Part 1630, Section 1630.2(o), and the EEOC's publication "EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act," dated March 1, 1999, pages 37 through 45. Just a few examples of the numerous judicial decisions discussing "reassignment to a vacant position" include *Wellington v. Lyon County School District* (9th Cir. 1999) 187

DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 pertain to employees with "*temporary* disabilities." The ADA and FEHA apply not only to employees with permanent disabilities but may also apply in some cases to employees with temporary disabilities. The federal Equal Employment Opportunity Commission ("EEOC"), in its EEOC Compliance Manual, Section 902 ("Definition of the Term 'Disability'"; as modified February 1, 2000), discusses the subject of when a temporary impairment constitutes a "disability" for ADA purposes and gives specific examples of a number of temporary impairments which would be considered "disabilities" subject to the ADA.

As indicated from the discussion above, the public policy and provisions of the ADA and FEHA are relevant in connection with the subject matter of DOM sections 31020.7.6.5.1 and 31020.7.6.5.7, involving employees with temporary disabilities and the possible reassignment of these employees to temporary duty (light duty) assignments as an accommodation of their disabilities. We find that the 60-day and 120-day limitations on temporary duty (light duty) assignments, as contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7, do address a matter of serious consequence involving an important public interest -- the protection of employees with disabilities from employment discrimination under ADA and the FEHA (including the "reasonable accommodation" of employees with disabilities in the workplace).[14] Consequently, under the narrow judicial determination of the scope of the internal management exemption outlined above, OAL concludes that the internal management exemption from the APA does not apply to the 60-day and 120-day limitations on temporary duty (light duty) assignments.[15]

F.3d 1150; *Hendricks-Robinson v. Excel Corporation* (7th Cir. 1998) 154 F.3d 685; and *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 96 Cal.Rptr. 236.

14. Here, OAL is finding solely that the 60-day and 120-day limitations on temporary duty (light duty) assignments address a matter of serious consequence involving an important public interest (for purposes of an APA internal management exemption analysis). We reiterate that we are *not* deciding whether these 60-day and 120-day limitations violate the ADA and the FEHA.

15. OAL notes that the Department has, in fact, prepared policies and procedures relevant to compliance with the ADA. The Department issued Administrative Bulletin 94/22 (dated December 27, 1994) with the subject "Americans with Disabilities Act Title 1 Interim Policy" (which document was attached as an exhibit to CSEA's request for determination). Furthermore, Article 1 of Chapter 3 of the DOM (commencing with DOM section 31010.1) relates to "Equal Employment Opportunity" and includes provisions for the "reasonable accommodation" of employees with disabilities.

In reaching this conclusion regarding the inapplicability of the APA internal management exemption to the rules here at issue, we are guided by the California Court of Appeal in *Grier v. Kizer, supra*, which stated the following in the context of its lengthy review of the internal management exemption:

> "[B]ecause the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* [Emphasis added.]" (219 Cal.App.3d at 438, 268 Cal.Rptr. at 253.)

Other APA Exemptions: In the Department's response to the request for determination, the Department asserts that two additional APA exemptions apply, at least in part, to this determination request.

First, the Department asserts that the APA "forms" exemption applies to certain California State Prison-Solano forms (and forms instructions) and to the June 1999 California State Prison-Solano Supplement to DOM section 31020.7.6.5.1, documents which were originally part of this determination request or were submitted as exhibits to the request.[16] The APA "forms" exemption is contained in Government Code section 11340.9, subdivision (c), which provides that the APA shall not apply to the following: "A form prescribed by a state agency or any instructions relating to the use of the form, but this provision is not a limitation on any requirement that a regulation be adopted pursuant to this chapter when one is needed to implement the law under which the form is issued." This determination request, as amended by CSEA on July 17, 2001, essentially requested that OAL determine whether the 60-day and 120-day limitations *as contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7* are "regulations" required to be adopted pursuant to the APA. Only those specific DOM sections -- which contain no forms whatsoever -- are actually at issue here. The "forms" from California State Prison-Solano are not directly at issue in this request. The California State Prison-Solano Supplement to DOM section 31020.7.6.5.1 is not part of the amended determination request and also is not at issue here. Therefore, the APA "forms"

Administrative Bulletin 94/22 and Article 1 of Chapter 3 of the DOM (neither of which contain the 60-day and 120-day limitations upon temporary duty (light duty) assignments) are not at issue in this determination request.

16. Department's "Response to Request for Determination," September 17, 2001, pages 2 and 6.

exemption is not applicable with respect to the rules actually at issue in the amended determination request.[17]

The Department also asserts that the APA exemption for a regulation "that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state" applies to the California State Prison-Solano forms and to the June 1999 California State Prison-Solano Supplement to DOM section 31020.7.6.5.1.[18] This APA exemption is contained in Government Code section 11340.9, subdivision (i), which provides that the APA shall not apply to the following: "A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state." The Department asserts that the California State Prison-Solano forms and the California State Prison-Solano Supplement to DOM section 31020.7.6.5.1 are regulations directed only to a specifically named group of persons (staff who have temporary medical restrictions at that Solano facility) and do not apply generally throughout the state. As stated above, only sections 31020.7.6.5.1 and 31020.7.6.5.7 of the statewide DOM are at issue in this determination request (as the request was amended by CSEA on July 17, 2001).[19] The Solano forms and Solano DOM Supplement are not themselves at issue. Therefore, the APA exemption for a regulation "that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state" is not applicable with respect to the rules actually at issue in the amended determination request.[20]

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17. Since only DOM sections 31020.6.7.5.1 and 31020.7.6.5.7 are actually at issue in this determination request (as amended), OAL has not fully evaluated and expresses no opinion as to whether the APA "forms" exemption would apply in whole or in part to the various California State Prison-Solano documents.

18. Department's "Response to Request for Determination," September 17, 2001, pages 2 and 6.

19. The DOM has statewide applicability. DOM section 12010.6, entitled "Department Operations Manual," states, in part, the following: "[The] DOM contains policy and procedures for *uniform operation of the Department* and is *issued statewide* to inform staff of the approved procedures for program operations." (Emphasis added.)

20. Since only DOM sections 31020.7.6.5.1 and 31020.7.6.5.7 are actually at issue in this determination request (as amended), OAL has not fully evaluated and expresses no opinion as to whether the APA exemption for a regulation "that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state" would apply in whole or in part to the various California State Prison-Solano documents.

After reviewing the three APA exemptions discussed above as well as all other potentially applicable APA exemptions, OAL finds that no express statutory exemption from the APA applies with respect to the 60-day and 120-day limitations on temporary duty assignments as set forth in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7.

We therefore conclude that the 60-day and 120-day limitations upon temporary duty (light duty) assignments for medically restricted employees of the Department, as contained in DOM sections 31020.7.6.5.1 and 31020.7.6.5.7, constitute "regulations" which are required to be adopted pursuant to the APA.

DATE: November 20, 2001

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